UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – DETROIT

In the Matter of:

Case No. 15-51011

Oakland Physicians Medical Center,
L.L.C. d/b/a/ Doctors' Hospital of
Michigan, a Michigan limited liability company,

Chapter 11
Hon. Maria L. Oxholm

Debtor
_____/

Basil T. Simon, not individually but solely
in his capacity as the Liquidation Trustee of
Oakland Physicians Medical Center, LLC,
Liquidation Trust,

Plaintiff,

Adv. Proc. No. 16-05120

v.

Yatinder Singhal,

Defendant.
_____/

REPORT AND RECOMMENDATION OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Before the Court are cross motions for partial summary judgment pursuant to Federal Rule of Civil Procedure 56, made applicable pursuant to Federal Rule of Bankruptcy Procedure 7056. On December 13, 2016, the plaintiff Basil T. Simon ("Plaintiff"), in his capacity as the liquidation trustee of debtor, Oakland Physicians Medical Center, L.L.C., d/b/a Doctors' Hospital of Michigan, a Michigan Limited Liability Company ("Debtor" or "Hospital"), filed this adversary proceeding alleging the following counts: Count I – Claim for Re-Characterization of any

Advances by Defendant; Count II– Fraudulent Transfers – 11 U.S.C. §§ 544, 548(a)(1)(B), 550 and 551; Count III – Avoidance of Fraudulent Transfers under Michigan's Uniform Fraudulent Transfer Act, M.C.L. §§ 566.31 et seq[1], and 11 U.S.C. §§ 544(b) and 550; Count IV – Breach of Statutory Duties to Act in Good Faith and in the Best Interests of the Company; Count V – Common Law and Statutory Conversion; Count VI – Equitable Subordination of Claims; and Count VII – Claim Disallowance 11 U.S.C. §502(d). (Second Am. Compl., ECF No. 102).

Plaintiff's Motion for Partial Summary Judgment pursuant to Rule 56 seeks judgment in Plaintiff's favor and against defendant Yatinder Singhal ("Defendant") on Counts II, III and V. (Pl.'s Mot. For Partial Summ. J., ECF No. 113). Defendant's Motion for Partial Summary Judgment, in turn, seeks judgment in Defendant's favor and against Plaintiff pursuant to Rule 56 on Counts II, III, IV and V. (Def.'s Mot. For Partial Summ. J., ECF No. 115).

The Court heard oral argument on September 20, 2018 and took the motions under advisement. On October 18, 2018, the Court gave its decision from the bench. The Court granted in part and denied in part Plaintiff's motion, granting judgment in Plaintiff's favor on Count V (Common Law Conversion) in the amount of $1,078,500.00, and denying judgment in Plaintiff's favor on Count V (Statutory Conversion) as well as Counts II and III. The Court further denied Defendant's motion as to Counts II, III, IV and V (Common Law Conversion), and granted Defendant's motion as to Count V (Statutory Conversion).

Pursuant to the Court's ruling, Plaintiff submitted a proposed order (Order Re. Pl's Mot for Partial Summ. J. and Def.'s Mot. for Summ. J. Pursuant to Fed. R. Civ. P 56, ECF No. 164). Defendant objected to the proposed order: (1) requesting the order provide for a report and

[1] Effective April 10, 2017, MUFTA has been replaced by the Uniform Voidable Transfer Act ("UVTA"). M.C.L. § 566.45(1). The amendments and additions set forth in UVTA do not apply to the transfers at issue as they arose prior to the effective date of the amendatory act. See M.C.L. § 566.45(2).

recommendation to the District Court, (2) arguing that the damages specified in the proposed order for conversion are erroneous and overreaching, and (3) claiming that Count IV was not involved in either of the cross-motions for partial summary judgment. (Def.'s Obj. to Proposed J. Pursuant to LBR 9021-1(a)(4)(B), ECF No. 166). The parties submitted supplemental briefs on Defendant's objection. (Supp. Memo of Law Re Def.'s Obj. to Proposed J. Pursuant to 9021-1(a)(4)(B), ECF No. 180; and Pl.'s Supp. Brief Re Bankr. Ct. Juris. to Enter Final J. in this Adversary Proceeding, ECF No. 191). On January 17, 2019, the Court had a hearing on Defendant's objection.

For the reasons stated fully on the record, the Court overruled Defendant's objection and entered the order on the parties' cross motions on January 18, 2019. (Order Re. Pl's Mot. For Partial Summ. J. and Def.'s Mot. For Summ. J. Pursuant to Fed.R.Civ.P. 56, ECF No. 199). First, the Court held that the reference to Count IV (Breach of Statutory Duties) was not erroneous as Defendant requested relief for the claim at least three times in his motion for partial summary judgment. Second, the Court held that Defendant waived any arguments regarding the amount of the judgment for the conversion claim. Defendant did not dispute—in either his motion, his response or during oral argument—the amount Plaintiff sought for this claim, or that he redirected the money and right of payment. Rather, Defendant argued that the board approved the diversion of the money and right to payment.[2] Finally, the Court concluded that it had the authority to issue a final order on the conversion and breach of statutory duties claims finding that—while both claims are state law causes of action that arose pre-petition, and thus, are non-core proceedings—

[2] The Court further clarifies that Trustee did not concede to a different amount as Defendant argued in his objection. In his motion, Trustee claimed that he is entitled to recover $1,079,308.70 in payments that should have been made to Debtor by Ross University School of Medicine and Windsor University pursuant to Affiliation Agreements between those schools and Debtor based on common law and statutory conversion. While Trustee maintained that Defendant received $456,000 from American Medical Education Group LLC and $58,200 from DHOM Education, LLC, Defendant fails to appreciate that common law conversion is not limited to the amount of money Defendant received for his personal use. (October 18, 2018 and January 17, 2019 Hr'gs). Because the amount was not addressed until after the Court granted Trustee's motion for summary judgment on the common law conversion, the Court ruled that the amount of the conversion claim is for the amount pled in the complaint.

the Court will necessarily resolve these claims in ruling on Plaintiff's claim for equitable subordination, relying on *In re Glob. Technovations Inc.*, 694 F.3d 705, 722 (6th Cir. 2012).

On February 28, 2019, the United States District Court issued an order vacating this Court's order (ECF No. 199) as to Counts IV and V and directing submission of a report and recommendation. (Memo. and Order Vacating Bankr. Ct's Summ. J. Order (Adv. P. DOC. 199) and Directing Submission of a Report and Recommendation, ECF No. 206). Defendant first filed a motion to withdraw the reference on July 10, 2018, which the District Court denied "without prejudice because the case would benefit from further proceedings in the bankruptcy court." (Memo. and Order Vacating Bankr. Ct's Summ. J. Order (Adv. P. DOC. 199) and Directing Submission of a Report and Recommendation, 2, ECF No. 206).

After reviewing the entire record, the Court submits proposed findings of fact and conclusions of law recommending that the District Court enter judgment in favor of Plaintiff on Count V (Common Law Conversion). Further this Court recommends that the District Court should enter a judgment in favor of Defendant on Count V (Statutory Conversion) and deny Defendant's motion for summary judgment on Count IV (Breach of Statutory Duties to Act in Good Faith and in the Best Interests of the Company).

II. JURISDICTION AND RELATED ISSUES

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and 28 U.S.C. §157. Counts IV and V of this adversary proceeding are non-bankruptcy claims that are non-core proceedings, "related to" a case under title 11 over which this Court cannot enter final judgment absent consent of the parties. 28 U.S.C. § 157(c); Federal Rule of Bankruptcy Procedure 9033. Defendant has objected to this Court's entry of a final judgment. Therefore, the Court submits these proposed

findings of fact and conclusions of law to the District Court for de novo review and entry of final judgment.

The remaining claims, Counts II and III, are core proceedings over which this Court has jurisdiction to enter final judgment. 28 U.S.C. § 157(b)(2)(H). Thus, the Court's order regarding these claims stands. (Order Re. Pl's Mot. For Partial Summ. J. and Def.'s Mot. For Summ. J. Pursuant to Fed.R.Civ.P. 56, ECF No. 199).

III. APPLICABLE STANDARD

Fed. R. Civ. P. 56, incorporated by Fed. R. Bankr. P. 7056 provides that

> summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48, 106 S. Ct. 2505, 2509–10 (1986). "[S]ubstantive law will identify which facts are material[; and o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id*. at 248, 106 S. Ct. at 2510. Moreover, the disputed material fact must be "genuine." *Id*. "[A] material fact is 'genuine,' … if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* The rule "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S. Ct. 2548, 2552 (1986).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323, 106 S. Ct. at 2552. "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." *Id.* at 324. Thereafter, "the nonmoving party [has] to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." *Id.*

IV. PROPOSED FINDINGS OF FACT

By way of background, Debtor was formed in 2008 to acquire the assets of Pontiac General Hospital. Debtor's members, who at the time consisted of approximately 45 physicians and McLaren Health Care ("McLaren"), invested millions of dollars into Debtor. In 2010, McLaren disassociated itself from the Hospital and demanded repayment of its secured loan. The member-physicians made advances to Debtor to enable it to pay off the debt owed to McLaren and to later finance Debtor's revival. Despite these efforts, Debtor suffered losses between 2010 and 2015 and required continued cash advances from its members in order to continue its operations. At all relevant times, Defendant, a practicing psychiatrist, was a board member and a shareholder of Debtor. (Def.'s Dep. Tr.,11-13, ECF No. 113-1). On July 22, 2015, Debtor filed a voluntary petition for relief under Chapter 11. Defendant filed a proof of claim in the amount of $1,499,983.13. (Claim No. 110). On December 13, 2016, Plaintiff filed this adversary complaint.

The pertinent facts for purposes of this report and recommendation are as follows. Debtor operated a student education program wherein Debtor would accept students from different medical schools for medical education clinical rotations. In return, the medical schools agreed to

pay Debtor agreed sums of money pursuant to their respective contracts. Among these schools were Ross University School of Medicine (referred to as "Ross" in pleadings and "RUSM" in the Affiliation Agreement) and Windsor University School of Medicine ("Windsor").

A. Ross Payments and Right to Payments

On March 26, 2012, Defendant, on behalf of Debtor, entered into an affiliation agreement with Ross, wherein Ross agreed to pay Debtor certain sums pursuant to the agreement. Specifically, the Affiliation Agreement provides,

> 2.1 Rights and Responsibilities – RUSM hereby assumes the following obligations and acquires the following rights with respect to the Program:
> …
> (c) RUSM shall pay to Doctors' Hospital consideration in an amount and in a manner consistent with the terms of the Addendum attached hereto and incorporated by reference herein;

(Second Am. Compl., Exh. C, ¶ 2.1, § (c), ECF No. 102). The Addendum to the Affiliation Agreement states in relevant part:

1. In consideration for Doctors' Hospital's performance of its obligations under the Affiliation Agreement, including its allocation of the clerkships pursuant to the same, RUSM shall, for each of the rotations identified in Section 3.1(b) and (c) of the Affiliation Agreement utilized by RUSM pay to Doctors' Hospital an amount equal to $500.00 per week per RUSM student in each contract year of the Term. If clerkships and/or rotations over and above those identified in Section 3.1(b) and (c) of the Affiliation Agreement, including elective rotations, are offered, accepted and utilized by RUSM pursuant to Section 1.4(c) and (f) of the Affiliation Agreement, then RUSM shall pay to Doctors' Hospital an amount equal to $500.00 per week, per student for the clerkships and rotation weeks accepted and used.

(Second Am. Compl., Exh. C, Addendum, ¶ 1, ECF No. 102). Paragraph 2 further provides that "RUSM shall pay Doctors' Hospital an amount equal to $500.00 per week per RUSM student for any 4th year or elective rotations …." (Second Am. Compl., Exh. C, Addendum, ¶ 2, ECF No. 102). Finally, Paragraph 3 specifies that

> The fees provided in paragraph 1 and 2 above shall be paid within ten (10) business days of RUSM's receipt of both the clinical evaluation forms required pursuant to

> Section 3.1(q) of the Affiliation Agreement and an appropriately detailed invoice from Doctors' Hospital, …

(Second Am. Compl., Exh. C, Addendum, ¶ 3, ECF No. 102).

On February 14, 2014, doctor Nikhil Hemady ("Hemady"), at the direction of Defendant, formed American Medical Education Group LLC ("AMEG"). (LARA Articles of Organization, AMEG, 1, Def.'s Mot., ECF No. 124-10; Hemady Dep., 26, ECF NO. 113-3). The purpose for AMEG's formation was to "provide guidance and advice to Hospital, physicians and students regarding career [*sic*] in medicine." (LARA Articles of Organization, AMEG, 2). Defendant and Hemady each hold a 50% membership interest in AMEG. (Hemady Dep., 20-23, 31, ECF No. 113-3). AMEG periodically would disburse payments to the two members, with Defendant receiving approximately $456,000.00.[3] (Def.'s Dep. Tr. 67-68, ECF No. 113-1).

On February 6, 2013, Defendant, on behalf of Debtor, wrote a letter to a Mr. Goetz requesting that all Ross payments be redirected to AMEG. The letter states,

> This letter is to request that based on a decision made by the Board of Directors of Doctors' Hospital of Michigan earlier this week, all Ross payments moving forward be directed to the American Medical Group, LLC, (Tax ID # 45-4550280) located at 461 West Huron Street, Ste 610, Pontiac, MI 48341. This decision will enable the clinical preceptors for various rotations at Doctors' Hospital to be paid in a timely manner.

(Exh. D, Second Am. Compl., ECF No. 102).

Exhibit E to the Second Amended Complaint shows the schedule of payments from August 22, 2012 to September 9, 2015. (Exh. E, Second Am. Compl., ECF No. 102). The Schedule shows each payment made from Ross to Debtor from August 22, 2012 to June 26, 2013 providing date of payment, check number and amount of payment for a total of $584,000. From June 16, 2013

[3] Defendant testified that he was paid $564,000.00. Plaintiff points out in his motion that this is incorrect and that checks from AMEG marked as Exhibit 3 to Defendant's deposition total $456,000.00. The checks were not attached as an exhibit and the Court has no way to verify the accurate amount. Nonetheless, the exact disbursement amount is not germane to this report and recommendation.

to September 9, 2015, the schedule states that payments were made from Ross to AMEG providing date of payment, check number and amount of payment for a total of $894,500.00. Schedule E together with the letter to Ross redirects the payments from Debtor to AMEG. The Court finds that these exhibits prove that Defendant redirected to AMEG specific money that was property of the Debtor.

B. Windsor Payments and Right to Payments

On January 1, 2015, Defendant, on behalf of the Debtor, entered into a similar affiliation agreement with Windsor. The Windsor Affiliation Agreement provides,

> Windsor University School of Medicine, ST Kitts will pay Doctors Hospital of Michigan, Pontiac for the services provided during Clinical Rotations for the students an amount of $400.00 (for Core rotation) per student per week. Amount will be released by the school biweekly on the submission of invoice by Doctors Hospital of Michigan.

(Second Am. Compl., Exh. F, ¶ XX, ECF No. 102).

On August 22, 2013, Prakash Sanghvi ("Sanghvi"), at the direction of Defendant, formed DHOM Education, LLC ("DHOM"). (LARA Articles of Organization, DHOM, 1, Def.'s Mot., ECF No. 124-11; Def.'s Dep Tr., 79-80, ECF No. 113-1). Sanghvi and Defendant each hold a 50% membership interest in DHOM. (Def.'s Dep Tr., 79-80, ECF No. 113-1). Defendant received over $58,200.00 in disbursements from DHOM. (Exh. H to Second Am. Compl., ECF No. 102-8).

Exhibits G, H and 5-B evidence that Defendant redirected to DHOM specific money that is property of Debtor, pursuant to the Affiliation Agreement. Exhibit G to the Second Amended Complaint, titled DHOM Education LLC provides a list of amounts paid from Windsor to DHOM by date from November 22, 2013 to November 25, 2015. (Exh. G, ECF No. 102). There is no total amount provided for the payments. Exhibit H to the Second Amended Complaint is

DHOM's general ledger. Exhibit 5-B is the affidavit of Prakash Sanghvi, attesting that "I have reviewed the Second Amended Complaint filed in this case together with Exhibit G attached thereto referenced in the Complaint. The dates and amounts of the payments made by Windsor University to DHOM, LLC shown on Exhibit G to the Second Amended Complaint are accurate according to the DHOM, LLC's books and records." (Pl.'s Mot., Exh. 5-B, ¶ 5, ECF No. 113).

C. Debtor's Operating Agreement and Authority to Take Action on Behalf of Debtor

Pursuant to Debtor's Operating Agreement, full disclosure and board authorization were required to redirect the Ross and Windsor payments. Paragraph 11.6 of the Debtor's Operating Agreement states that a member of the board of directors "shall have no authority to take action on behalf of the company in his or her individual capacity except pursuant to specific authorization by the Board of Directors or to the extent a member of the Board of Director also holds an executive position as an officer or agent of the Company and takes action in that capacity." (Operating Agreement, Pl.'s Mot., ¶ 11.6, ECF No. 113-4). Furthermore, per paragraph 11.3(a)(1) of the Operating Agreement, Defendant was required to fully disclose the transaction to all members of the board. (Operating Agreement, Pl.'s Mot., ¶11.3(a)(1), ECF No. 113-4).

Defendant directs the Court to the following excerpts from his deposition testimony that he claims create a genuine issue of material fact that he obtained board approval to redirect the payments:

> …
> Dr. Hemady came and asked the board. So the idea was to train these students at different doctors' offices so that those doctors get motivated to bring the business to our--- Doctors' Hospital. Dr. Hemady because he was in family practice and involved with that --- those doctors wanted to come but wanted to be compensated obviously for their services and they will not trust Doctors' Hospital for payment because Doctors' Hospital --- I'm going into detail. I don't know if you need that or not. I don't know.
> Q: You can continue

A: So it was Dr. Hemady --- so our situation was that we cannot afford to have any business, which causes a loss.
Q: which goes where?
A: Causes a loss to the hospital. So it was --- **Dr. Hemady said he wanted to rotate the hospital so how could we do that. The board approved that. This medical education trust will give a fixed amount to the hospital every month or whatever, $8,000 I think it was for a student or per month or whatever. So the hospital situation was net gain, zero cost, zero loss. So the hospital was making money.** Another corporation was formed from which he paid the doctors. The doctors will trust the corporation to be paid on time, unlike the hospital. They will not trust the hospital that they will get it on time. That's all I know about American Education.

(Def.'s Dep. Tr., 57-58) (emphasis added).

Q: **Before you signed this agreement on behalf of the hospital who did you discuss the terms of the agreement with?**
A: I didn't discuss it. I told you that. Dr. Hemady did everything.
…I was basically teaching the students.

(Def.'s Dep. Tr., 63) (emphasis added).

Q: Dr. did you ever receive any payments from AMEG?
A: Yes I did.
Q: Do you remember how much you received from them?
A; I can't tell you the exact amount.
Q: What would have been the purpose of the payments to you?
A: For rotating the medical students with me.
Q: Rotating medical students?
A: Yeah.

(Def.'s Dep. Tr., 67).

A: My main duties were to get the doctors to train the students and teach them and make sure—so they bring business to the hospital. Our main interest was to get 10, 20 physicians, who get to do all of the teaching, so that basically they are interested in the hospital so they can bring business to the hospital.

(Def.'s Dep. Tr., 69).

Q: All right. Did you receive any money personally from DHOM, LLC?
A: Yes, I did.
Q: How much did you receive?
A: I don't know.
Q: What would have been the purpose for receiving that money?
A: Teaching the medical students.

(Def.'s Dep. Tr., 80).

> Q: Were the board members aware that you had an interest in DHOM?
> A: Board members knew that I had an interest and board members also knew that I got the contract with the hospital from them because of my own relationship with them.
> . . .
> A: The whole purpose of the contract was to-so that the physician gets entrusted in the hospital, bring business to the hospital. The only intent from the Board was to get business to the hospital so that we have more revenues.

(Def.'s Dep. Tr., 85-86).

> Q: Okay. I'm just trying to understand. You said you set up AMEG—you helped set up AMEG because the doctors, who would be teaching, were afraid they wouldn't get paid?
> A: Yeah. That's correct.

(Def.'s Dep. Tr., 87).

Nothing in these excerpts evidences board approval for redirecting the payments from Debtor to another entity. Defendant testified that the board approved the medical program. Under the approved program, the medical education trust would pay Debtor *directly*. This is quite different from the board approving the redirecting of the payments from Debtor to another entity. Defendant further discusses the purpose for forming AMEG and DHOM. However, the excerpts before the Court do not create a genuine issue of material fact regarding the relevant board approval.

Defendant alternatively argues that the board approval was in the missing board minutes. From the evidence presented there are no board minutes for October 17, 2011 to December 21, 2012 and May 13, 2013 to November 27, 2013. However, the fact remains that there is no evidence that the board approval is contained in the missing minutes. Defendant did not testify to that effect. Defendant's argument, that the approval is in the missing minutes, is not evidence. In fact, Dr.

Michael Short ("Short"), another member of the board of directors, testified that he had no knowledge of AMEG or Defendant's involvement with AMEG. (Short Dep, p 60, Def.'s Mot., ECF No. 113-2). Short did not recall "whether there ever was a board meeting in 2013 where there was a decision made by the board to direct Ross University to pay monies it was paying to the hospital to American Medical Group[.]" (Short Dep, p 60, Def.'s Mot., ECF No. 113-2).

V. PROPOSED CONLCUSIONS OF LAW

A. Common Law Conversion

Plaintiff claims that based on common law conversion he is entitled to recover $1,079,308.70 in payments that should have been made to Debtor by Ross and Windsor pursuant to Affiliation Agreements between those schools and Debtor. Plaintiff contends that there is no genuine issue of material fact that Defendant converted property of Debtor, by directing payments to AMEG and DHOM, two entities in which Defendant had an ownership interest and from which he received over $500,000 in distributions.

Plaintiff claims that the right of payment as well as the payments themselves were converted. Plaintiff cites to *Aroma Wines & Equip, Inc. v. Columbian Distribution Servs., Inc.*, 497 Mich. 337, 359, 871 N.W.2d 136, 148 (2015) and *CH Holding Co. v. Miller Parking Co.*, 534 B.R. 308, 318 (E.D. Mich. 2015) which define both common law and statutory conversion as "any distinct act of domain wrongfully exerted over *another's personal property* in denial of or inconsistent with the rights therein." *Id* at 318. Plaintiff further maintains that in addition to the actual payments which were property of Debtor per *CH Holding Co.*, the contract benefit of the right to payments was also the personal property of Debtor per *Tuuk v. Anderson,* 21 Mich App 1, 13-14 (1969).

Here, Plaintiff specifically claims that (1) the Affiliation Agreements signed by Defendant (in his capacity as a board member) provide that payments by Ross and Windsor were to be made to Debtor; (2) Defendant instructed Ross to make payments to AMEG by letter; and (3) Plaintiff is unable to find a similar letter directed to Windsor, however argues that there is no genuine issue of material fact that Windsor paid DHOM instead of Debtor. Plaintiff further contends that there is no genuine issue of material fact that Defendant converted personal property of Debtor as neither AMEG nor DHOM had a legal interest in the payment under the Affiliation Agreement. Moreover, the duties and obligations of Debtor under the Affiliation Agreements were not assigned.

Plaintiff further asserts that such diversion of payments violated M.C.L. § 450.4409 and paragraphs 11(a)(1) and 11.6 of the Operating Agreement. Moreover, Plaintiff argues that Defendant owed and breached a fiduciary duty owed to Debtor—that is the obligation to deliver the payments under the Affiliation Agreements.

In response, Defendant maintains that there is a genuine issue of material fact that there was a conversion of money to AMEG and DHOM from Debtor. Defendant claims that the purpose of AMEG and DHOM was to get the doctors who taught the medical students paid on a timely basis, and to get teaching doctors interested in the hospital so that those doctors would bring business to the hospital. Defendant further claims that he was paid by AMEG and DHOM for teaching the medical students. Moreover, Defendant argues that Debtor's board approved the arrangement for payment from foreign medical schools to AMEG and DHOM, citing to the previously quoted excerpts from his July 19, 2017 deposition. Finally, Defendant claims that the board approval is contained in the missing board minutes.

Significantly, Defendant limits his argument to board approval being obtained for the diversion of payments from Ross and Windsor to AMEG and DHOM. Defendant is not disputing

that the Affiliation Agreements provide that payments by Ross and Windsor were to be made to Debtor. Nor is Defendant disputing that he redirected the Ross and Windsor payments from Debtor to AMEG and DHOM. Finally, Defendant is not contesting that board approval was required for such action.

Under the common law, conversion is " 'any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.' " *Aroma Wines & Equip, Inc. v. Columbian Distribution Servs., Inc.,* 497 Mich. 337, 346, 871 N.W.2d 136, 141 (2015). The Michigan Supreme Court in *Aroma* noted,

> More recently, *Thoma v. Tracy Motor Sales, Inc.* reaffirmed this definition of conversion and adopted the Restatement of Torts to illustrate examples of "the ways in which a conversion may be committed." The excerpt adopted by the Court states:
>
> "A conversion may be committed by
> "(a) intentionally dispossessing another of a chattel,
> "(b) intentionally destroying or altering a chattel in the actor's possession,
> "(c) using a chattel in the actor's possession without authority so to use it,
> "(d) receiving a chattel pursuant to a sale, lease, pledge, gift or other transaction intending to acquire for himself or for another a proprietary interest in it,
> "(e) disposing of a chattel by sale, lease, pledge, gift or other transaction intending to transfer a proprietary interest in it,
> "(f) misdelivering a chattel, or
> "(g) refusing to surrender a chattel on demand."
> …
> To summarize: While the tort of conversion originally required a separate showing that the converter made some use of the property that amounted to a total deprivation of that property to its owner, by the twentieth century common-law conversion more broadly encompassed any conduct inconsistent with the owner's property rights.

Aroma Wines & Equip, Inc., at 351–53 (footnotes omitted). First, regarding the payments, "Money is treated as personal property, and an action may lie in conversion of money provided that 'there is an obligation to keep intact or deliver the specific money in question, and where such money can be identified.'" *Dunn v. Bennett*, 303 Mich. App. 767, 778, 846 N.W.2d 75, 81 (2013). Second, "intangible personal property can be the subject of conversion[.]" *Tuuk v. Andersen*, 21

Mich. App. 1, 13, 175 N.W.2d 322, 328 (1969) (*citing Warren Tool Company v. Stephenson* (1968), 11 Mich. App. 274, 298, 161 N.W.2d 133).

1. The Ross and Windsor payments were property of Debtor

Here, the Affiliation Agreement between Ross and Debtor provides that "RUSM shall pay to Doctors' Hospital consideration in an amount and in a manner consistent with the terms of the Addendum attached hereto and incorporated by reference herein[.]" (Second Am. Compl., Exh. C, ¶ 2.1, § (c), ECF No. 102). The Addendum to the Affiliation Agreement states in relevant part:

> 1. In consideration for Doctors' Hospital's performance of its obligations under the Affiliation Agreement, including its allocation of the clerkships pursuant to the same, ***RUSM shall . . . pay to Doctors' Hospital*** an amount equal to $500.00 per week per RUSM student in each contract year of the Term. If clerkships and/or rotations over and above those identified in Section 3.1(b) and (c) of the Affiliation Agreement, including elective rotations, are offered, accepted and utilized by RUSM pursuant to Section 1.4(c) and (f) of the Affiliation Agreement, then ***RUSM shall pay to Doctors' Hospital*** an amount equal to $500.00 per week, per student for the clerkships and rotation weeks accepted and used.

(Second Am. Compl., Exh. C, Addendum, ¶ 1, ECF No. 102) (emphasis added). Paragraph 2 further provides that "***RUSM shall pay Doctors' Hospital*** an amount equal to $500.00 per week per RUSM student for any 4th year or elective rotations …." (Second Amended Compl., Exh. C, Addendum, ¶ 2, ECF No. 102) (emphasis added). Finally, Paragraph 3 specifies that "[t]he fees . . . shall be paid within ten (10) business days of RUSM's receipt of both the clinical evaluation forms . . . and an appropriately detailed invoice from Doctors' Hospital, …" (Second Am. Compl., Exh. C, Addendum, ¶ 3, ECF No. 102).

The Affiliation Agreement between Windsor and Debtor provides

> ***Windsor University School of Medicine, ST Kitts will pay Doctors Hospital of Michigan,*** Pontiac for the services provided during Clinical Rotations for the students an amount of $400.00 (for Core rotation) per student per week. Amount will be released by the school biweekly on the submission of invoice by Doctors Hospital of Michigan.

(Second Am. Compl., Exh. F, ¶ XX, ECF No. 102) (emphasis added).

Accordingly, both Ross and Windsor contractually agreed to pay Debtor directly in consideration for the residency programs. This establishes that the money for the residency programs was Debtor's property. Ross and Windsor were both obligated to deliver specific amounts of money to Debtor.

2. The redirecting of payments and the right of payment are distinct acts of domain wrongfully exerted over Debtor's property

Defendant redirected the Ross and Windsor payments from Debtor to AMEG and DHOM, respectively. As detailed above, Defendant's letter to a Ross representative redirecting payments from Debtor to AMEG (Exhibit D), along with the schedule of payments (Exhibit E) evidences that Defendant redirected the payment of a total of $894,500.00 from Debtor to AMEG. Likewise, the DHOM list of payments (Exhibit G), DHOM's general ledger (Exhibit H) and Sanghvi's affidavit (Exhibit 5-B) evidence that Defendant redirected the list of payments set forth in Exhibit G (no total provided) from Debtor to DHOM. Again, Defendant does not dispute that he redirected the money and right of payment from Ross and Windsor to AMEG and DHOM; rather he argues that the board approved this action.

Next, the Court will consider whether this redirecting of this money and right of payment are a "distinct act of domain wrongfully exerted over" Debtor's property in denial of or inconsistent with the rights therein. The Plaintiff relies in part on M.C.L. § 450.4409 which states in relevant part,

> Sec. 409. (1) Except as otherwise provided in an operating agreement, a transaction in which a manager or agent of a limited liability company is determined to have an interest shall not, because of the interest, be enjoined, be set aside, or give rise to an award of damages or other sanctions, in a proceeding by a member or by or in the right of the company, if the manager or agent interested in the transaction establishes any of the following:
> (a) The transaction was fair to the company at the time entered into.

> (b) The material facts of the transaction and the manager's or agent's interest were disclosed or known to the managers and the managers authorized, approved, or ratified the transaction.
> (c) The material facts of the transaction and the manager's or agent's interest were disclosed or known to the members entitled to vote and they authorized, approved, or ratified the transaction.

M.C.L. § 450.4409.

Full disclosure and board authorization were required to redirect the Ross and Windsor payments. Paragraph 11.6 of the Operating Agreement states that a member of the board of directors "shall have no authority to take action on behalf of the company in his or her individual capacity except pursuant to specific authorization by the Board of Directors or to the extent a member of the Board of Director also holds an executive position as an officer or agent of the Company and takes action in that capacity." (Operating Agreement, Pl.'s Mot., ¶ 11.6, ECF No. 113-4). Furthermore, per paragraph 11.3(a)(1) of the Operating Agreement, Defendant was required to fully disclose the transaction to all members of the board. (Operating Agreement, Pl.'s Mot., ¶11.3(a)(1), ECF No. 113-4).

None of the testimony creates a genuine issue of material fact that Defendant did not obtain board approval for redirecting payments. Much of Defendant's cited testimony focuses on the purpose of creating AMEG and DHOM. However, the reason for creating these entities is irrelevant, as regardless of their purpose, Defendant was required to get board approval to redirect the payments. Likewise, testimony regarding the arrangements with the medical schools and the fact that Defendant received money from AMEG and DHOM for teaching medical students is not evidence that the board approved the diversion of the funds to AMEG and DHOM from the Debtor. Lastly, that other board members had knowledge of Defendant's interest in DHOM is not evidence of board approval.

Defendant alternatively attempts to argue that the minutes from board meetings are missing and the board approval is contained in the missing minutes. As discussed above, there is no evidence that the board approval is contained in the missing minutes. Defendant's argument, that the approval is in the missing minutes, is not evidence.

Accordingly, the redirecting of the payments from Ross and Windsor to AMEG and DHOM constitutes common law conversion. Plaintiff presented sufficient evidence to establish his claim for common law conversion; Defendant's proffered evidence is insufficient to create a genuine issue of material fact. Therefore, the Court recommends that Plaintiff's motion on common law conversion should be granted. The Court further recommends that Defendant's motion for summary judgment on common law conversion should be denied finding that Defendant's proffered evidence does not establish a genuine issue of material fact, let alone that he is entitled to summary judgment in his favor on this claim.[4]

B. Statutory Conversion

The Michigan Supreme Court in *Aroma Wines & Equip, Inc*. specifically addressed "whether a plaintiff who has proved common-law conversion necessarily has a cause of action

[4] Defendant additionally raised numerous defenses in his motion and response to Plaintiff's motion. Defendant "listed" collateral estoppel, judicial estoppel, and quasi-estoppel and merely provided one line definitions without setting forth their respective tests and applying the facts of this case to those tests. The Court, in its October 18, 2018 bench opinion, held that Defendant failed to provide adequate analysis and thus failed to establish that collateral estoppel, judicial estoppel and quasi-estoppel apply to bar Plaintiff's claims.

Defendant additionally raised the defense of *in pari delicto*. Defendant cited to numerous nonbinding cases which discuss the purpose of the defense—to protect judicial integrity and to deter wrongdoing—and New York's "adverse interest" exception. Neither of these principles were developed. Defendant ignored the binding precedent setting forth the required elements for the application of *in pari delicto* in *Orzel v. Sccott Drug Co*., 449 Mich 550 (1995). For the foregoing reasons, the Court denied these defenses in its October 18, 2018 bench opinion.

To the extent any of the defenses are also applicable to Counts IV and V, the District Court should treat the Court's October 18, 2018 decision as a report and recommendation.

under MCL 600.2919a(1)(a) and, if not, what additional conduct is required to show that a defendant converted property to his, her, or its own use." *Id*. at 346. Section 2919a provides:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.
>
> (2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.

MCL § 600.2919a.[5]

The *Aroma Wines & Equip, Inc.* Court found that

> the separate statutory cause of action for conversion "to the other person's own use" requires a showing that the defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose is not the object's ordinarily intended purpose.

Id. at 361. Furthermore, treble damages are discretionary, as explained in *LMT Corp. v. Colonel, L.L.C.*, No. 294063, 2011 WL 1492589, at *3 (Mich. Ct. App. Apr. 19, 2011):

> Michigan courts have generally held that the term "may" is permissive whereas the term "shall" is mandatory. *Manuel v. Gill*, 481 Mich. 637, 647; 753 NW2d 48

[5] *In re Dantone*, 477 B.R. 28, 38 (B.A.P. 6th Cir. 2012) provides,

> Michigan Complied Laws § 600.2919a was amended in 2005. Prior to that time, the behavior described in subsection (b) was the only basis for "statutory conversion." As a result, treble damages were only available when a third party had acquired the converted property. In 2005, "[t]he Legislature added 600.2919a(1)(a) so that a plaintiff could receive treble damages from the actual thief himself." *Joy & Middlebelt Sunoco, Inc. v. Fusion Oil, Inc.*, 2008 WL 283767, at *2, n. 2 (E.D.Mich. Jan. 31, 2008) (citation omitted). In the present case, the factual allegations in the state court complaint suggest that the state court judgment was based on § 600.2919a(1)(a), as opposed to § 600.2919a(1)(b). Conversion under § 600.2919a(1)(b) does not apply to the person who committed conversion. Instead, it "applies only to *other* persons, who buy, receive, possess, conceal, or aid in the concealment of stolen, embezzled, or converted property, with knowledge that the property was stolen, embezzled, or converted." *In re Pixley*, 456 B.R. at 786.

Id. at 38.

> (2008). Thus, pursuant to the language in MCL 600.2919a(1), treble damages are permissive. Therefore, the trier of fact has the discretion to decide whether to award treble damages pursuant to MCL 600.2919a when actual damages are sustained as a result of another person stealing, embezzling, or converting one's property.

Id. at *3.

In his brief, Plaintiff did not differentiate between common law and statutory conversion and has not pointed to evidence showing that Defendant employed the right to payment or the payments themselves for some purpose personal to his interest. At the September 20, 2018 hearing, Plaintiff acknowledged this distinction and argued that, based on the same evidence, he satisfies the elements of statutory conversion.

Per M.C.L. § 600.2919a and *Aroma Wines & Equip, Inc.*, Plaintiff must establish that "defendant employed the converted property for some purpose personal to the defendant's interests." Furthermore, because we are dealing with money, per *Dunn v. Bennett* "an action may lie in conversion of money provided that 'there is an obligation to keep intact or deliver the specific money in question, and ***where such money can be identified.***'" *Dunn*. at 778 (emphasis added). At the September 20, 2018 hearing, Plaintiff admitted that he has no knowledge of DHOM or AMEG's accounting to be able to identify specific funds. Therefore, Plaintiff cannot trace the specific money he identified that was transferred from Ross and Windsor to AMEG and DHOM, as the same money transferred from AMEG and DHOM to Defendant.

Regardless of whether Plaintiff can satisfy the elements of statutory conversion, treble damages are discretionary and Plaintiff has not made out his argument that the circumstances of this case warrant treble damages. Accordingly, the Court recommends that Plaintiff's motion on statutory conversion be denied. The Court further recommends that Defendant's motion for summary judgment in his favor on statutory conversion be granted.

C. Breach of Statutory Duties

Defendant's introductory paragraph and prayers for relief request judgment in his favor on Count IV (Breach of Statutory Duties). Defendant provides no argument in support of dismissing this claim. Accordingly, the Court recommends denial of Defendant's motion for summary judgment on Count IV.

VI. CONLCUSION

For the foregoing reasons, pursuant to 28 U.S.C. § 157(c)(1) and Fed. R. Bankr. P. 9033(a), the Court enters and submits proposed findings of fact and conclusions of law recommending that the United States District Court enter judgment in favor of Plaintiff on Count V (Common Law Conversion) in the amount of $1,078,500.00. This Court recommends that the District Court should further enter a judgment in favor of Defendant on Count V (Statutory Conversion) and deny Defendant's motion for summary judgment on Count IV (Breach of Statutory Duties to Act in Good Faith and in the Best Interests of the Company).

Pursuant to Fed. R. Bankr. P. 9033(a), the Clerk "shall serve forthwith copies on all parties by mail and note the date of mailing on the docket." Fed. R. Bankr. P. 9033(a). Within the time prescribed by the rule, "a party may serve and file with the clerk written objections which identify the specific proposed findings or conclusions objected to and state the grounds for such objection." Fed. R. Bankr. P. 9033(b).

Signed on April 26, 2019

/s/ Maria L. Oxholm
Maria L. Oxholm
United States Bankruptcy Judge